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No. 654

IN THE

Supreme Court of the United States

October Term 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

LAWRENCE S. HELMERS, LEWIS LEVI, OSCAR SCHWARTZ, ALICE STERNE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, A. M. Anderson, Receiver of the National Bank of Kentucky, upon the direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari be granted to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered June 24, 1946. Rehearing was denied petitioner August 19, 1946.

JUDGMENTS BELOW

The District Court for the Southern District of Ohio overruled the motion of respondents to dismiss the complaint (R. 23, 30).[1] The opinion of the Sixth Circuit Court of Appeals reversed the District Court and ordered the complaint dismissed on the ground that the cause of action was barred by the Statute of Limitations (R. 2); 156 F. (2d) 47. The decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 24, 1946. A petition for rehearing was timely filed and was denied on August 19, 1946.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit on the same matter which is now pending before this court on petition for writ of certiorari, in the cause entitled *Francis R. Cope, Jr., Petitioner* v. *A. M. Anderson, Receiver of the National Bank of Kentucky, Respondent*, No. 593, October Term 1946.

JURISDICTION

The jurisdiction of this court to review this cause by writ of certiorari is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The cause of action alleged seeks to impose liability for a national bank stock assessment upon shareholders of a bank stock holding company organized under the laws of Delaware.[2] The action was brought in the Southern District of Ohio well within the six-year period provided by the general laws of Ohio for the bringing of such actions. However, the action was brought after the expiration of the

[1] Not reported.
[2] *Anderson* v. *Abbott*, 321 U. S. 349.

five-year period of limitations provided by the laws of Kentucky for similar actions brought in that state.

The only question is whether the general law of Ohio, which permits suits to be brought within six years upon federally created causes of action where the federal law contains no limitation, shall be applied, or whether the Kentucky law barring actions in Kentucky on liabilities created by statute within five years, shall be *borrowed* under an exception to the general Ohio statute which provides that "if the laws of any state or country where the cause of action arose limit the time for the commencement of an action to a less number of years than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years."[1]

The District Court for the Southern District of Ohio held that the cause of action was to recover a liability imposed by the National Bank Act and therefore was timely brought. The Court of Appeals for the Sixth Circuit held that the cause of action arose in the State of Kentucky and was therefore barred. Petitioner contends that the cause of action is a federally created right arising under the laws of the United States and that the liability sought to be recovered is imposed by federal laws upon the shareholders of banks wherever they reside and in every state of the union and is not a cause of action which arose in Kentucky. No other question is involved.

STATUTES INVOLVED

The cause of action is to recover a liability imposed and created by the National Bank Act, 12 U. S. C., Sections 63 and 64, Appendix p. 1. The Petitioner, as Receiver of an insolvent national bank, is mandated by federal law to

[1] Ohio General Code, Sec. 11234.

enforce the personal liability of shareholders under 12 U. S. C., Sections 191 and 192, Appendix p. 2. 12 U. S. C., Section 192, directs the Receiver to "pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller and also make report to the Comptroller of all his acts and proceedings." The Ohio Statute of Limitations, which is applicable to statutory liabilities, including the recovery of liabilities created by federal statutes where no federal statute of limitation exists, is six years after the cause thereof accrues. *Ohio General Code,* Sec. 11222, Appendix p. 3. The exception to the general statute, sometimes referred to as the Ohio Borrowing Statute, upon which the Respondents rely, is *Ohio General Code,* Section 11234, Appendix p. 3. The Kentucky Statute of Limitations which Respondents seek to borrow provides for a five-year period for actions in that state upon liabilities created by statute. *Kentucky Revised Statutes,* Section 2515, now Section 413.120, Appendix p. 3.

SUMMARY STATEMENT

The Petitioner as Receiver of the National Bank of Kentucky was required to resort to a court of equity to unravel the complications and pierce the corporate veil which surrounded the true, real and beneficial ownership of the bank stock. The story is told in detail in the opinion of this court in *Anderson* v. *Abbott,* 321 U. S. 349, and we therefore deem it unnecessary to do more than briefly note these facts. Practically all of the National Bank stock was registered in the names of six trustees under a lengthy trust indenture (R. 5). The trustees in turn issued so-called Trustees Participation Certificates (R. 6). Approximately ninety-five per cent of these Trustees Participation Certificates representing National Bank stock were exchanged for shares of stock of a Delaware corporation known as the

BancoKentucky Company, hereinafter referred to for brevity as "Banco" (R. 9). Banco was organized under the ordinary corporation laws of Delaware with omnibus powers. It was, in fact, a holding corporation which not only held the trust certificates representing the stock of the National Bank of Kentucky but also held stock in various other national and state banks located in both Ohio and Kentucky. In addition, Banco had a small number of shares of stock in an Ohio insurance company and debentures of a New Jersey rubber company.[4]

Petitioner brought this suit to recover from a large group of Ohio shareholders of Banco their proportionate part of the uncollected assessment on the bank shares represented by the Trust Certificates held by Banco. The Receiver had previously brought suit against the Banco corporation itself and recovered judgment, *Laurent* v. *Anderson*, 70 Fed. (2d) 819. Before bringing the suit against the corporation and its Receiver, petitioner sent a warning notice to the shareholders advising them of his intention to proceed, first, against Banco, that if he was unable to collect the assessment from Banco he would endeavor to collect the deficiency from its shareholders. The Receiver was only able to collect a small part of the assessment from the Receiver of Banco and brought actions in numerous states against shareholders residing therein to recover the deficiency, after giving credit to the defendants for collections made on the judgment against Banco (R. 17). The present suit was filed against Ohio shareholders on December 12, 1936, which was more than five but less than six years after the assessment became due.

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[4] *Atherton* v. *Anderson*, 86 Fed. (2d) 518, 99 Fed. (2d) 983, and also *BancoKentucky Company's Receiver* v. *National Bank of Kentucky's Receiver*, 281 Ky. 784, 137 S. W. (2d) 357.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Sixth Circuit Court of Appeals is in direct conflict with the decision of the Third Circuit Court of Appeals in a similar suit brought by the Petitioner against a large number of shareholders of Banco residing in Pennsylvania. Petition for writ of certiorari to review the decision of the Third Circuit Court of Appeals is now pending before this court in the cause entitled *Francis R. Cope, Jr., Petitioner* v. *A. M. Anderson, Receiver of the National Bank of Kentucky, Respondent,* No. 593, October Term 1946.[1] In the opinion of the United States Circuit Court of Appeals for the Third Circuit, Judge Goodrich states:

> "In reaching this conclusion we are quite conscious that we are in disagreement with our brethren in the Sixth Circuit in the decision they reached in *Helmers* v. *A. M. Anderson,* Fed. (2d) (C. C. A. 6, 1946), a case decided since the submission of the one at bar. We have read the carefully prepared opinion in that case, but are still constrained to follow the view of the matter which we have expressed above."

Petitioner believes that this cause falls squarely within the letter and spirit of Rule 5(b) indicating that the court will consider as a valid reason for granting review on certiorari the fact that "a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter."

2. We also believe that the question involved is an important question of federal law which should be finally

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[1] A large number of shareholders are defendants in both the Pennsylvania and the Ohio actions but in order to condense the record and save costs counsel have agreed that since the question involved is identical in all cases it may be presented in the case of a single shareholder in Pennsylvania and in the cases of four shareholders in Ohio, and that all other defendants in said actions will be bound by the decisions in the present cases.

settled by this court and that the Sixth Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this court. The question of liability for stock assessments and the applicable statute of limitations is important.*

The decision of the Sixth Circuit holding that the cause of action was contractual in character and that failure to pay at the office of the Receiver at Louisville was, in effect, a breach of contract in Kentucky, is contrary to this court's interpretation of the Receiver's notice to shareholders. *Anderson* v. *Abbott*, 321 U. S. 349, at page 354. It is also contrary to the decisions of this court which hold that Respondents' liability is statutory, not contractual and not bottomed on fault. *Anderson* v. *Abbott*, at pages 356 and 366; *McClaine* v. *Rankin*, 197 U. S. 154, at page 162. Under the applicable decisions of this court, the Sixth Circuit Court of Appeals erred in holding that the cause of action arose in Kentucky and in applying the law of limitations applicable to a state created right. See *Holmberg* v. *Armbrecht*, 327 U. S. 392.

Wherefore, your petitioner prays that this petition be granted and that a writ of certiorari issue to review this cause and the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered June 24, 1946.

ROBERT S. MARX,
FRANK E. WOOD,
WM. C. KELLY,
HARRY KASFIR,
Counsel for Petitioner.

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* A number of national banks have not availed themselves of the privilege of terminating assessment liability of their shareholders under the permissive provisions of Section 64(a) of the National Bank Act. Certiorari was granted in *Fisher* v. *Whiton*, 317 U. S. 217, 219, because of the importance of the question of applicability of federal statutes of limitation to assessment claims in the administration of insolvent national banks, as well as because of conflict between decisions of Circuit Courts of Appeals.

BRIEF

The opinions below, statement of jurisdiction, the questions involved and a summary statement of the case are contained in the petition for writ of certiorari.

ARGUMENT

We respectfully submit that the reasons relied on for the allowance of the writ show the importance of the question involved and the necessity for review thereof by this court in order to resolve the conflict which has arisen between the Third Circuit Court of Appeals and the Sixth Circuit Court of Appeals on the same matter. The same stock assessment is involved in both cases; the same liability is asserted and is alleged to have arisen in the same way. In fact, the cases are identical with the cases against shareholders residing in the Western District of Kentucky, which were determined by this court in *Anderson* v. *Abbott*, supra. As this court has previously been advised, the actions against shareholders residing in other districts and in other states were stayed pending the decision of this court in *Anderson* v. *Abbott*. It so happens that the so-called Borrowing Act of Ohio and the so-called Borrowing Act of Pennsylvania are similar and in both the suit against Ohio shareholders and in the suit against Pennsylvania shareholders the defendants sought to borrow the same Kentucky statute. Hence, the questions to be determined are similar and should the petition for certiorari in this cause and in the case arising from Pennsylvania (*Cope* v. *Anderson*) be granted the causes can be argued and briefed together. If certiorari be denied an obvious injustice would necessarily result. It would not be in the interest of the orderly administration of justice to permit the Receiver to recover against the Pennsylvania shareholders and to deny him the right to recover against the Ohio shareholders, or vice versa.

In addition to the conflict between the decisions of two Circuit Courts of Appeal on the same matter, we respectfully urge that the Sixth Circuit Court of Appeals has decided an important question of federal law contrary to the applicable decisions of this court and that this question should be finally determined by this court. We believe it clear that this court has held that the liability for stock assessment imposed by the National Bank Act is statutory in character. *Anderson* v. *Abbott*, 321 U. S. 349, 366; *McClaine* v. *Rankin*, 197 U. S. 154, 162. Further, this court has indicated that statutes of limitation applicable to state created rights are not applicable as a bar to federally created rights. *Holmberg* v. *Armbrecht*, 327 U. S. 392. We do not believe it appropriate at the present posture of the case to brief the merits of the question presented. The excellent opinion of the Third Circuit Court of Appeals clearly demonstrates the erroneous conclusion reached by the Sixth Circuit Court in this cause. It would seem self-evident that within their constitutional sphere the laws of the United States impose stock assessment liabilities upon shareholders in every state in the union, which may be enforced wherever the shareholder resides and that such cause of action is not created by or limited by the laws of any one state. Where Congress has not seen fit to impose any federal limitation it must be presumed to have intended that the limitation of the forum where suit is brought shall be applied. The Respondents in the present case were residents of Ohio, when the assessment was levied and when it was payable. They never resided in Kentucky. They default and their resistance to payment occurred in Ohio where they lived; not in Kentucky where they were total strangers. They were not stockholders in a Kentucky corporation nor in a Kentucky bank. They were shareholders of a Delaware corporation, the Banco-Kentucky Company, which was not even admitted to do

business in the State of Kentucky. It is anomalous to say that the cause of action arose in Kentucky where defendants have never been and where no action against them could be brought and that a cause of action arose in a state where there was no right of action against Respondents.

We therefore respectfully submit that the cause of action in this case arose under the laws of the United States and not under the laws of Kentucky and that the petition for a writ of certiorari should be granted.

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WM. C. KELLY,
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Counsel for Petitioner.

APPENDIX

U. S. C. Title 12

§ 63. Individual liability of shareholders.

The shareholders of every national banking association shall be held individually responsible, equally and ratably and *not one for another*, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; . . .

U. S. C. Title 12

§ 64. Same; transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.

U. S. C. Title 12

§ 191. General grounds for appointment of receiver.

Whenever . . . or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192 of this title. June 30, 1876, c. 156, § 1, 19 Stat. 63.

U. S. C. Title 12

§ 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Ohio General Code

§ 11222. *Contract not in writing.* An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forefeiture or penalty, shall be brought within six years after the cause thereof accrued.

Ohio General Code

§ 11234. *Action, time for bringing.* If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years.

Kentucky Revised Statutes

§ 413.120 (2515; 2518). *Actions to be brought within five years.*

The following actions shall be commenced within five years after the cause of action accrued:

. . . .

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

. . . .